No. 84-1528

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In the Supreme Court of the United States

OCTOBER TERM, 1984

G. HUGH WAMBLE, ET AL., CROSS-APPELLANTS

v.

WILLIAM J. BENNETT, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, ET AL.

ON CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MOTION TO VACATE AND REMAND

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The Solicitor General, on behalf of the Secretary of Education, moves that the cross-appeal in this case be held in abeyance pending final disposition by this Court of *Aguilar* v. *Felton,* juris. postponed, No. 84-237 (Oct. 9, 1984), following which, unless the judgment below is summarily affirmed in Nos. 84-1355 and 84-1343, the judgment should be vacated and the case remanded to the district court for reconsideration.

1. This cross-appeal is from the same district court judgment appealed by the government in No. 84-1355 and by the intervenors in No. 84-1343. That judgment declared "that the Title I bypass as currently administered in Missouri on the premises of religiously affiliated schools violates the First Amendment" and permanently enjoined "its further administration in that manner" (J.S. App. 33a-34a).

The judgment was stayed by the district court sua sponte pending disposition by this Court of the appeal in *Aguilar* v. *Felton, supra,* a case described by the district court (J.S. App. 2a n.1) as "strikingly similar in its facts and issues to the case at bar."

A full statement of this case is set forth in our jurisdictional statement (at 2-12) in *Bennett* v. *Wamble,* No. 84-1355. We have asked the Court to hold our appeal in *Bennett* v. *Wamble* for disposition in light of *Aguilar,* and the intervenor-appellants in *Ferguson* v. *Wamble,* No. 84-1343, have done the same. Cross-appellants have filed a motion to affirm in Nos. 84-1355 and 84-1343, and request that the Court note probable jurisdiction in this cross-appeal only in the event that their motion is not granted (J.S. 24).

We disagree with the one-sided distillation of the factual record set forth by cross-appellants (J.S. 4-11). As cross-appellants themselves have pointed out elsewhere (84-1355 Mot. to Affirm at 26), "many of the facts [in this case] are disputed." Virtually all of cross-appellants' arguments are based on matters in the record that are not reflected in factual findings by the court below, or on interpretations of the record that are contradicted by the factual findings of the court below. We will not belabor these points, because we believe that the lower federal courts provide the appropriate forum for resolution of these fact-specific issues.

2. Cross-appellants have raised some seven issues "in order to broaden and by more precision make more enforceable the relief provided in the judgment entered by the lower court and to preserve additional questions regarding the constitutionality of the Missouri Title I program" (J.S. 3). None of the questions presented warrants consideration by this Court. To the extent that any of the questions raised in the cross-appeal warrant further consideration by any court, the appropriate forum for their resolution

is the district court on remand, with appeal to the court of appeals (followed by certiorari, if appropriate). As discussed more fully below, cross-appellants' interests in refining the scope of the relief and in preserving additional constitutional issues can be fully vindicated without plenary review by this Court at this stage, whatever may be the Court's disposition of *Aguilar* and the appeals in Nos. 84-1355 and 84-1343.

a. Cross-appellants' first two questions presented (J.S. i) are simply restatements of the issue presented in Nos. 84-1355 and 84-1343, and are virtually identical to that in *Aguilar*. As we observed in our jurisdictional statement in No. 84-1355 (at 15), the Court will probably be able to dispose of these issues in summary fashion in light of the decision in *Aguilar*.

b. Cross-appellants' third question presented (J.S. i) relates to the adequacy of the relief granted by the district court. The question is whether the district court abused its remedial discretion in not granting declaratory[1] and "immediate" injunctive relief.[2] The question is entirely dependent on the specific circumstances of this case and

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[1]We do not understand why cross-appellants are dissatisfied with the supposed lack of a declaratory judgment; the district court expressly declared "that the Title I bypass as currently administered in Missouri on the premises of religiously affiliated schools violates the First Amendment" (J.S. App. 33a) and entered a permanent injunction against "its further administration in that manner" (*id.* at 33a-34a).

[2]Cross-appellants' claim that the district court erred in not granting "immediate injunctive relief" is presumably now moot. Had cross-appellants desired to challenge the district court's decision to stay its judgment pending disposition of *Aguilar*, they should have appealed that interlocutory order or applied to the Circuit Justice for an order dissolving the stay. Since cross-appellants do not discuss the matter of "immediate injunctive relief" in their jurisdictional statement (other than setting it out in their "questions presented"), it is difficult to know what might be the basis for their claim at this juncture.

does not warrant review by this Court. To the extent that these matters have any continuing relevance after this Court's disposition of the appeals in Nos. 84-1355 and 84-1343, they can be raised in the lower courts on remand.

c. Cross-appellants' fourth question presented (J.S. i) poses a self-evident non sequitur. It is based on the notion that the children of "parents [who] decide not to opt for church-related schools" are "deprived of full access" to the Title I program in Missouri (J.S. 11), from which cross-appellants would conclude that that their "First and Fifth Amendment rights" are violated by the bypass program (J.S. i). However, such children, if otherwise eligible, are entitled by law to comparable Title I services in their own schools. See 20 U.S.C. 2740(a); 20 U.S.C. (Supp. I) 3806(a). If services provided to them were in fact *not* comparable to services provided to private school children under the bypass, they might well have a claim for relief. It would not, however, follow that the bypass program is unconstitutional, but at most that there should be readjustments in the allocations of funds. The district court has not addressed this issue (if it is an issue) and the record is plainly inadequate for this Court to do so.

d. Cross-appellants' fifth question presented (J.S. i) is an assertion of the rights of otherwise eligible schoolchildren who do not attend a "church school which has entered into an agreement with an agent of the government for the providing of [Title I services]" to receive Title I services. Apparently, cross-appellants are referring to church affiliated schools that choose not to permit the government to conduct a Title I program within the school, which according to cross-appellants include Amish, Mennonite, Seventh-day Adventist, and Christian day schools in Missouri (J.S. 7; see *id.* at 8).[3] However, since cross-appellants do not

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[3]There have been no factual findings on this point.

include amongst their number any persons who attend church schools that do not permit Title I services to be provided under the bypass program (J.S. 4), they do not have standing to assert the interests of such persons.[4] In any event, the issue will be rendered meaningless if the judgment below is affirmed, and can be raised, if at all, in the lower courts on remand in the event that the judgment is reversed or vacated.

e. Cross-appellants' sixth question presented (J.S. i-ii) is whether the district court erred in determining that their challenge to the religious neutrality of the contractor, Blue Hills Home Corporation (BHHC), is now moot in light of changes in the contractor's structure and operation (see J.S. App. 17a). The seventh question (J.S. ii) is a restatement of the sixth, focusing on whether the court below erred in not granting declaratory and injunctive relief on that challenge. The issue raised in these two questions, as conceived by cross-appellants, is purely one of fact (see J.S. 22 ("[t]he court's conclusion as to BHHC's ostensible neutrality is contradicted by current constitutionally relevant facts")) and does not warrant this Court's attention. If the judgment below is affirmed, there will be no need for further consideration of the issue. If the judgment below is reversed or vacated, cross-appellants' rights can be vindicated in the lower courts on remand: if the district court adheres to its earlier view on the matter (as we would urge and expect it to do), cross-appellants will be free to appeal this entirely factual issue to the United States Court of Appeals for the Eighth Circuit.

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[4]If otherwise eligible schoolchildren attending such schools were in fact being denied Title I services, the proper avenue for raising the matter would be for them to request services directly from the contractor or the Secretary (see 34 C.F.R. 200.80(b)).

3. There is no merit to cross-appellants' suggestion (J.S. 24-25) that the Court defer decision in *Aguilar* "so that both *Aguilar* and this case may be ultimately jointly considered by this Court." *Aguilar* involves the nation's largest Title I program, with a clear and undisputed factual record documenting the manner in which it has been conducted on the premises of private schools for a period of almost 20 years. The *Aguilar* Title I program, moreover, is administered by the local public school district—by far the more common form of Title I administration—rather than, as here, by a private contractor pursuant to the relatively unusual "bypass" procedure. Briefing and argument are complete in *Aguilar*, and, together with *School District of Grand Rapids* v. *Ball*, cert. granted, No. 83-990 (Feb. 27, 1984), *Aguilar* provides a sound basis for resolving the principal constitutional issues arising from on-premises remedial instruction for disadvantaged children attending religiously affiliated schools. The additional issues in the instant case, which in many particulars depend on disputed and unresolved questions of fact, are best left to the lower courts on remand.

We therefore urge this Court to hold the cross-appeal in this case in abeyance pending decision in *Aguilar*. If, in light of *Aguilar*, the Court in Nos. 84-1355 and 84-1343 vacates and remands the decision below, cross-appellants will be free to raise any of the preserved issues in district court, with appeal to the Eighth Circuit and eventual review by this Court on writ of certiorari in the event that significant unresolved issues of law should emerge. Even if the Court should decide to grant plenary review in Nos. 84-1355 and 84-1343, there would be no reason for the Court to address the totally fact-bound additional issues in this cross-appeal. If the decision below is reversed after briefing and argument, cross-appellants would be free to raise their claims on remand. Cross-appellants do not request this Court to hear the issues in this cross-appeal in the event that the decision below is affirmed (J.S. 24).

In sum, whatever may be the disposition of the appeals in Nos. 84-1355 and 84-1343, the issues raised in this cross-appeal do not warrant this Court's attention, and should be reserved for resolution by the lower courts on remand.

CONCLUSION

This cross-appeal should be held for disposition in light of *Aguilar*, following which, if cross-appellants' motion to affirm in Nos. 84-1355 and 84-1343 is not granted, the judgment of the district court should be vacated and the case remanded for reconsideration.

Respectfully submitted.

REX E. LEE
Solicitor General

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